Nos. 15-233, 15-255

IN THE

Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, *et al.*,

Respondents.

MELBA ACOSTA-FEBO, *et al.*,

Petitioners,

v.

FRANKLIN CALIFORNIA TAX-FREE TRUST, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber has a strong interest in the proper resolution of this case. Many of the Chamber's members are active in the nationwide municipal bond market and many more depend on the public works this market funds. Furthermore, the Chamber's members depend on a stable, predictable, and nationally uniform bankruptcy system. These important interests would be jeopardized if Puerto Rico is allowed to enact its own municipal bankruptcy regime. That is especially true given that the argument upon which Petitioners rely will extend that same latitude to all States. The national uniformity the Constitution envisions and Congress implemented through the Bankruptcy Code would be destroyed if all fifty States have the freedom to establish their own

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1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

municipal bankruptcy systems. The economic instability such a patchwork regime would produce would cause significant harm to the Chamber's members.

SUMMARY OF ARGUMENT

The Debt Enforcement and Recovery Act ("Recovery Act") was passed to provide special protection to Puerto Rico's financially troubled public utilities. Not only is this bankruptcy protection available only to Puerto Rico's public utilities, such as the Puerto Rico Electric Power Authority ("PREPA"), it creates a special local court for resolution of their debts, and it deprives their mostly out-of-state creditors of the structural protections afforded to them under the federal Bankruptcy Code. In many ways, the Recovery Act resembles a private bill passed for the special benefit of a particular set of insolvent entities: Puerto Rico's public instrumentalities.

Indeed, it was statutes much like the Recovery Act that motivated the Framers to vest Congress with the bankruptcy power in the first place. The complete lack of bankruptcy uniformity was one of the principal flaws of the Articles of Confederation. The Framers wisely found that the wide variation in bankruptcy systems, and the parochial squabbling this patchwork regime encouraged, inhibited interstate commerce and, in turn, the formation of a truly national economy. In the end, the proposition that the Constitution should empower Congress to create a uniform bankruptcy system that ensured that creditors from distant jurisdictions would be treated fairly when investments soured drew almost no opposition.

The Bankruptcy Code achieves that foundational objective by expressly preempting laws like the Recovery Act. There can be no bankruptcy uniformity if States and territories can break contracts for the special benefit of distressed municipalities. Section 903(1) thus provides "that a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition." 11 U.S.C. § 903(1). Puerto Rico is a "State" for purposes of this section of the Bankruptcy Code, the Recovery Act is a "law," and it binds creditors of Puerto Rico's public utilities without their consent. It is difficult to conceive of a statute that could more squarely conflict with Section 903(1)'s text than the Recovery Act.

Puerto Rico's main response is that Section 903(1) does not apply to it because, unlike States, Puerto Rico cannot authorize its municipalities to seek protection under Chapter 9. But the argument is misplaced as both a matter of law and equity. Legally, the distinction that Puerto Rico seeks to draw has no footing in the statutory text. Nor is the result incongruent or unfair. Congress made the same policy choice here (to deny municipalities access to Chapter 9) for Puerto Rico that many States have made for themselves. Congress's decision to make that choice itself, instead of delegating it to Puerto Rico, is neither unusual nor inappropriate given Congress's unique relationship with the territories. Disagreement with Congress's policy choice provides no basis to rewrite Section 903(1).

Petitioners' main textual argument (an argument Puerto Rico has in fact abandoned) is that Section 903(1) is inapplicable because PREPA is not a "debtor" as the

Bankruptcy Act defines that term and, as a consequence, Respondents are not "creditors." But that assertion is unsustainable too. If Petitioners were right, every State could follow Puerto Rico's lead, override Chapter 9, and create their own municipal bankruptcy system. After all, a State would only need to deny its municipalities the authority to file a Chapter 9 petition to liberate itself from Section 903(1)'s preemptive sweep. Even if that did not happen, though, it would become effectively impossible for *any* municipality to file under Chapter 9 as it would have no "creditors" to contact before commencement of a case—a predicate requirement before seeking protection under the Bankruptcy Code. That cannot be correct. Given the Bankruptcy Code's structure, context, and purpose, this is a classic instance in which the ordinary meaning of the statutory term must govern.

Confronted with their inability to mount a textual defense, Petitioners retreat to a series of presumptions in an attempt to skew the statutory inquiry. But none of the presumptions—some of which (such as the presumption against "No Man's Land") Petitioners have invented—applies. The presumption against preemption certainly is inapplicable. The creation of a new municipal bankruptcy system for public utilities was not an exercise of the police power. It was an attempt by the Commonwealth at self-help—to take matters into its own hands to rescue its municipalities from their debts. Moreover, the presumption does not apply when a state or locality interjects itself into an area with a longstanding federal presence. Congress's role in shaping a bankruptcy system dates backs to the Founding.

The avoidance canon also is inapplicable. Petitioners claim Section 903(1) creates Tenth Amendment concerns. However, as Petitioners acknowledge, those concerns do not apply to Puerto Rico—those concerns apply to the States. Accordingly, the interpretation of the statute that would be needed to avoid this purported constitutional problem is implausible. The Court would need to read Section 903(1) to allow all fifty States—not just Puerto Rico—to override Congress's considered judgment that Chapter 9 would be the exclusive means for bankrupt municipalities to discharge their debts. That would not only betray the law's text and structure, but would defeat Congress's goal of uniformity.

In reality, if the avoidance canon has a role to play here, it is in buttressing the First Circuit's interpretation of the statute. Although there is not a Tenth Amendment claim in this case, there is a Contract Clause claim. Even putting aside Section 903's clear barrier to unilaterally rewriting Petitioners' debt-securities contracts, it is doubtful that Puerto Rico, as a constitutional matter, may abrogate contracts between these municipalities and their creditors without violating the Contract Clause. Only Respondents' interpretation of Section 903(1) avoids this thorny constitutional question.

The practical consequences of Petitioners' argument are no less concerning. They propose an interpretation of Section 903(1) that would, at a minimum, permit non-uniform, home-rule bankruptcy statutes to be enacted in Puerto Rico and the District of Columbia. That alone would be a serious issue. In reality, though, Petitioners' interpretation of the statute cannot be limited to its application to these territories. Their novel construction

of Section 903(1) would *encourage* all fifty States to avoid Chapter 9 too by denying their municipalities authority to secure relief through federal bankruptcy. That would, in turn, obliterate the Code's promise of uniformity, restore the inefficient and fragmented bankruptcy systems that predated the Constitution, and start a race to the bottom in municipal bankruptcy.

Indeed, the Recovery Act's favoritism for Puerto Rico's municipalities at the expense of its creditors could serve as a model for other States. The short-term financial gain a State would secure by following Puerto Rico's lead is obvious. The fact that creditors hailing from California, for example, are having their valid contracts overridden by Puerto Rico here would only provide States additional incentive to return the favor. Parochial laws like the Recovery Act thus threaten to restore the State-to-State jousting that the Bankruptcy Code was supposed to halt.

The result would be a municipal bond market with reduced access to the low-cost capital the investor class has always supplied. In enacting Chapter 9, Congress recognized that credit markets, especially the market for municipal bonds whose issuers can be fickle political entities, depend on a stable and predictable bankruptcy system. Chapter 9 guarantees that predictability as to municipal bankruptcies. Creditors thus are able to invest on the understanding that, one, state law (or federal law for Puerto Rico and the District of Columbia) will dictate whether a given municipality may file for bankruptcy and, two, that any petition will be filed under Chapter 9 unless creditors are willing to consent to an alternative process. Investors may hesitate before participating in a system that allows Puerto Rico to change the rules *ex*

post. If they do invest, the terms would need to account for this new risk.

The economy is likely to suffer in the end. Municipal bonds fund infrastructure projects that keep the backbone of our economy in good condition. Safe roads, bridges, and airports, good schools, and well-equipped public safety departments create the conditions that spur economic growth. If private investment becomes scarcer, more expensive, or quite likely both, municipalities may have to delay or cancel many of these important projects. The Nation's long-term economic interests should not be jeopardized so Puerto Rico (and many other States if Petitioners prevail) may reap short-term political gain. The Framers were wise to demand a uniform bankruptcy system, and Congress smartly used its constitutional authority to implement that vision through statutory provisions like Section 903. The First Circuit's judgment should be affirmed.

ARGUMENT

I. Congress Preempted Laws Like The Recovery Act In Order To Ensure National Uniformity in Municipal Bankruptcies.

A. The Constitution Empowers Congress To Fashion A Uniform Bankruptcy System.

While our new nation immediately "enjoyed a rapid growth in commerce," "the Articles of Confederation made no provision for regulation of commerce or bankruptcy." Graydon S. Staring, *Bankruptcy—an Historical View*, 59 Tul. L. Rev. 1157, 1159 (1985). As a consequence,

"the several States ... had wildly divergent schemes for discharging debtors and their debts." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 365 (2006). "In England, where there was only one sovereign, a single discharge could protect the debtor from his jailer and his creditors." *Id.* at 366. But "uncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules, rendered impossible so neat a solution on this of the Atlantic." *Id.* at 365.

Though it was not just each State's unique approach to bankruptcy that inhibited interstate commerce. "The States' practice of enacting private bills" contributed significantly to the problem and "rendered uniformity impossible." *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982). Private bills, for obvious reasons, had "raised the spectre of the exploitation of political influence to garner special indulgences." G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 Bus. Law. 499, 576 (2000). Furthermore, "the colonies sometimes enacted debt relief provisions in brazen attempts to lure citizens from other locations" and "displayed discriminatory tendencies toward foreign obligees, particularly British creditors in the aftermath of the Revolution." *Id.* at 577. "The implications of these practices on a national system of commerce were not lost on the Framers." *Id.*

The Bankruptcy Clause's path to ratification thus was marked by a "general agreement on the importance of authorizing a uniform federal response to the problems" and "difficulties posed by [the] patchwork of insolvency and bankruptcy laws" that had plagued the nation in

its infancy. *Katz*, 546 U.S. at 369, 366; *see also id.* at 363 ("Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State."); *see also In re Jordan*, 13 F. Cas. 1079, 1080 (W.D.N.C. 1873) ("[I]t was obvious to the framers ... that the benefits of a wise, humane and general system of bankruptcy, which might, under certain exigencies, become necessary to promote the happiness and commercial prosperity of the nation, could only be effectually established by the federal government adopted by the people of the several states for general and national purposes.").

To that end, the Constitution provides, first, that "[t]he Congress shall have Power To ... establish ... uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. Art. I, § 8, cl. 4, and, second, that "No State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10, cl. 1. These two clauses work in tandem. The Bankruptcy Clause empowers Congress to create a nationwide system for discharging debts; the Contract Clause keeps States from disrupting this system on an *ad hoc* basis. "Hence the importance of the distinction between the power of Congress and the power of the states. The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do." *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 188 (1902); *see also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

The Bankruptcy Code, as to municipalities, fulfills the mission the Framers set for Congress. Specifically, Chapter 9 authorizes municipalities to enter into federal bankruptcy. *See* 11 U.S.C. § 109(c). The State controls whether a municipality may take advantage of Chapter 9 protection. *See id.* § 109(c)(2). Those States that do not opt into Chapter 9 are free to bail out their financially distressed municipalities themselves. *See id.* § 903 ("This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise."). But to avoid the problem of States setting up their own competing municipal bankruptcy regimes, "a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition." *Id.* § 903(1).

B. Section 903(1) Of The Bankruptcy Code Preempts The Recovery Act.

As Respondents thoroughly explain, Section 903 expressly preempts the Recovery Act, which seeks to prescribe "a method of composition of indebtedness" for a Puerto Rican "municipality" without the "consent" of its "creditor[s]." 11 U.S.C. § 903(1); *see* BlueMountain Capital Mgmt., LLC Br. 18-23 ("BlueMountain Br."); Franklin Respondents Br. 7-12 ("Franklin Br."). First, the Recovery Act is "a State law" because "State" is defined to include "the District of Columbia and Puerto Rico, except for the purpose of defining who may be a

debtor under chapter 9 of this title." *Id.* § 101(52).[2] Second, the Recovery Act prescribes a method of composition of indebtedness by permitting a municipality to "seek debt relief from its creditors," Recovery Act § 201(b); Comm. Pet. App. 210a, and permitting public corporations "to defer debt repayment and to decrease interest and principle" that is owed to creditors, *id.* Stmt of Motives, § E; Comm. Pet. App. 160a. Third, the Recovery Act seeks to diminish the rights of creditors without their consent. Recovery Act § 202(d)(2); Comm. Pet. App. 212a-213a.

Notably, the Commonwealth offers no reason why 903(1)'s text does not encompass the Recovery Act. Instead, Puerto Rico argues that because it is "ineligible to authorize its municipalities to restructure their debts under Chapter 9, there is no basis to apply Section 903(1) ... to Puerto Rico." Brief for Commonwealth Petitioners 26-27 (internal citations omitted) ("Comm. Br."). But Puerto Rico misapprehends the Bankruptcy Code's structure. Under Chapter 9, as noted above, each State controls whether its municipalities will have access to Chapter 9 protection. Many States allow their municipalities to be a Chapter 9 debtor, but many do not. The only difference is that, as to Puerto Rico and the District of Columbia, Congress retained that authority and made the decision itself to deny to municipalities access to Chapter 9. That should not come as a surprise given Congress's special relationship with these jurisdictions. *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (per curiam) (explaining that

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2. The utilities in question, such as PREPA, also are each a "municipality" as the Bankruptcy Code defines that term. 11 U.S.C. § 101(40) ("The term 'municipality' means political subdivision or public agency or instrumentality of a State.").

Congress is "empowered under the Territory Clause of the Constitution" with plenary authority over Puerto Rico); *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) (same).

As a result of that special relationship, this Court has recognized that "Congress has the power to treat Puerto Rico differently, and ... every federal program does not have to be extended to it." *Califano v. Gautier Torres*, 435 U.S. 1, 3 n.4 (1978) (per curiam); *see Harris*, 446 U.S. at 651 ("Congress ... may treat Puerto Rico differently from States."). For example, Congress has carved out certain Social Security Act benefits to Puerto Rico and has provided less federal assistance to Puerto Rico in some instances. *See Califano*, 435 U.S. at 2-3; *Harris*, 446 U.S. at 651. Chapter 9 is no different.

Moreover, as demonstrated by the many States that have taken the same action reflects, opting out of Chapter 9 is a reasonable policy choice. Petitioners are free, of course, to disagree with Congress's judgment. And they can push Congress to amend the Bankruptcy Code. At the end of the day, "[t]hese are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

Only the Government Development Bank Petitioners ("GDB") try to grapple with the statutory text and, even then, they do not prevail. GDB Br. 31-33. GDB argues that even though Respondents are creditors of Puerto Rico's municipalities within the ordinary meaning of the word, they are not "creditors" under the statute because these

municipalities are not "debtors." GDB Br. 31-32. As the First Circuit explained, however, this is a case in which the ordinary meaning must control. Comm. Pet. App. 34a-36a; BlueMountain Br. 34-41; Franklin Br. 36-43; *see, e.g.*, *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 412 (1983). "By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding ... for that term itself, no less than the specific definition, is part of the statute." *Stenberg v. Carhart*, 530 U.S. 914, 992 (2000) (Thomas, J., dissenting).

It is common ground that "context, not just literal text, will often lead a court to Congress' intent in respect to a particular statute." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005) (Breyer, J., concurring). And, here, context renders GDB's reading untenable. Following GDB's reasoning to its logical conclusion would mean that *any* State could circumvent Section 903(1)'s preemptive effect simply by failing to permit its municipalities to file for bankruptcy under Section 109(c)(2). Comm. Pet. App. 32a-34a. Once that occurs, the State would have no Chapter 9 debtors (like Puerto Rico) and thus no "creditors" to which Section 903(1) would apply. The State would, accordingly, be free to create its own municipal bankruptcy system. In other words, by declining to grant its municipalities authority to file for federal bankruptcy, States could escape Section 903(1)'s preemptive force. The Court should reject this wooden construction. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 355 (1st ed. 2012) ("Strict constructionism understood as a judicial straightjacket is a long-outmoded approach deriving from a mistrust of all enacted law.").

Petitioners claim in response that allowing those States that decline to make their municipalities eligible for Chapter 9 relief to pass laws like the Recovery Act "may create an impermissible 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), whereas an interpretation of Section 903 that allows Puerto Rico to do so would not." Comm. Br. 43. But that is a conclusion—not an answer. Petitioners' invented distinction certainly has no basis in the text of the statute. Moreover, if allowing Michigan to create a system for Detroit frustrates the longstanding federal interest in bankruptcy uniformity, then so does the Recovery Act. *See infra* at 22-28.

Worse still, this interpretation would have a ripple effect that would cause Chapter 9 to collapse on itself as it would block all municipalities from filing bankruptcy petitions. The Code requires the insolvent municipality to engage in pre-filing negotiations with its "creditors." 11 U.S.C. § 109(c)(5). But under GDB's interpretation, the municipality would have no "creditors" to contact because there would be no "debtor" until the Chapter 9 case had "been commenced." *Id.* § 101(13). That would render Section 109(c)(5) meaningless. No interpretative principle commands the Court to adopt a self-defeating interpretation of federal law.

C. No Presumption Or Canon Of Avoidance Negates Section 903's Express Preemption Of The Recovery Act.

Given their inability to square their argument with Section 903(1), Petitioners invoke one purported presumption after another. Comm. Br. 27-42; GDB Br. 19-25, 39-45. As an initial matter, each of these presumptions is merely that: a presumption that can be overcome by a clear statement from Congress. Comm. Br. 33 ("[N]o one denies that Congress could preempt the Recovery Act if it clearly expressed an intent to do so."). As explained, Section 903(1) is that clear statement of preemption. In any event, no presumption or avoidance canon upon which Petitioners rely can assist them.

First, contrary to Petitioners' claim, GDB Br. 19-25; Comm. Br. 28, the "presumption against preemption" is no help. Foremost, the presumption is categorically inapplicable when there is an express preemption provision. *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 554 (2009) (Thomas, J., dissenting, joined by Roberts, CJ., Kennedy, and Alito, JJ.) ("There should be no presumption against preemption because Congress has expressly pre-empted state law in this case."); *see generally* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner, *Nat'l Meat Assoc. v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224), 2011 WL 3821399 (explaining why the presumption against preemption does not apply to express preemption provisions). Because Section 903(1) expressly preempts legislation like the Recovery Act, no presumption against that preemption applies.

But even if the presumption could apply to an express preemption case, it still would be inapplicable here. The presumption applies (at most) only when Congress has "legislated ... in a field which the States have traditionally occupied." *United States v. Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The presumption "is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.* (emphasis added). That is crucial here because the Bankruptcy Code is not collaterally interfering, for example, with state-created property rights or tort law. *See e.g., Wos v. EMA*, 133 S. Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit." (citation omitted)).

The issue here centers on Puerto Rico's entry into bankruptcy itself, where Congress's creation of a uniform system demonstrates "a history of significant federal presence." *Locke*, 529 U.S. at 108; *see also Whyte v. Barclays Bank PLC*, 494 B.R. 196, 200 n.6 (S.D.N.Y. 2013) ("Because there is a history of significant federal presence in this area of regulation, the Court does not apply a presumption against preemption."). From the beginning, States generally have been "without power to make or enforce any law governing bankruptcies that impairs the obligation of contracts or extends to persons or property outside its jurisdiction or conflicts with the national bankruptcy laws." *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 263-64 (1929). Petitioners' assertion that the Bankruptcy Code interferes with an historic State power thus misses the mark. "The state laws now in question bear upon" Congress's enumerated bankruptcy power,

and "in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108.

Petitioners' attempt to reframe Section 903(1) as interfering with "Puerto Rico's police power" misses the mark. GDB Br. 20-24. Nearly *any* area of the law can be recast as being within the State's "traditional authority." And this Court has previously rejected attempts to do so. In *Wos v. EMA*, for example, North Carolina enacted a law that required Medicaid beneficiaries to reimburse the State for up to a third of their tort damages if the State made Medicaid payments to treat the injury. 133 S. Ct. at 1395. But a federal law prohibited States from attaching liens of this sort to a beneficiary's property. *Id.* at 1394-95. The Court rejected North Carolina's claim that the federal statute interfered with its "traditional authority to regulate tort actions." *Id.* at 1400. Because the North Carolina law sought to regulate Medicaid beneficiaries, the State could not rely "upon a connection to an area of traditional state regulation" to avoid preemption. *Id.* So too here. Puerto Rico has not exercised its police power; the Commonwealth has entered the area of bankruptcy. It cannot rely on the presumption against preemption to save the Recovery Act.

Second, Puerto Rico relies on what it terms the presumption against Congress establishing a "No Man's Land." Comm. Br. 28-35; GDB Br. 25. There is little to say about this presumption for a straightforward reason: there is no such thing. No case Puerto Rico cites recognized (let alone applied) this so-called presumption. Comm. Br. 28-29 (collecting cases). At least one of the cases merely applied the presumption against preemption. *See Head*

v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 431-32 (1963) ("In the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern."). The Court should decline this invitation to create a new presumption.

Third, Puerto Rico contends there is a "Presumption Against Interference with Fiscal Management of a State's Own House." Comm. Br. 35. But this is just another attempt to reframe the presumption against preemption. *Id.* at 36 (arguing that this presumption exists because "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" (quoting *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014)). None of the cases that Puerto Rico references recognizes a freestanding presumption against interfering with a state's fiscal management.

Fourth, and last, Puerto Rico relies on the "presumption against raising serious constitutional questions," *i.e.*, the canon of constitutional avoidance. Comm. Br. 38-42. To the extent this canon applies at all, it is to Petitioners' detriment. According to Puerto Rico, Section 903(1) raises Tenth Amendment concerns because it interferes with the sovereign right of States to manage their own municipalities. Comm. Br. 38. Yet Puerto Rico acknowledges, as it must, that there is no Tenth Amendment issue as applied to it. Comm. Br. 41 ("Petitioners are not arguing here that Puerto Rico is a State protected by the Tenth Amendment."). Any reading of the law designed to avoid this purported constitutional problem, therefore, could not be limited to Puerto Rico; it would need to apply to the States as well.

That ought to end the matter. Puerto Rico's entire statutory argument is premised on the contention that it should not be subject to Section 903(1) because, *unlike the States*, it may not authorize its municipalities to pursue bankruptcy through Chapter 9. Puerto Rico cannot secure an interpretation of the Bankruptcy Code that treats it differently from the States by invoking a Tenth Amendment issue that only applies to the States and not Puerto Rico. Moreover, under *Clark v. Martinez*, 543 U.S. 371 (2005), if constitutional doubt exists, "[t]he lowest common denominator, as it were, must govern." *Id.* at 380. To avoid the claimed Tenth Amendment problem with Section 903(1), in other words, the Court would need to read the Bankruptcy Code to allow *every* State to create their own municipal bankruptcy scheme. As explained above, that is not a plausible interpretation of Section 903(1). *See supra* at 12-14; BlueMountain Br. 44-45.

More importantly, perhaps, that interpretation of Section 903(1) would create (rather than avoid) serious constitutional questions under the Contract Clause. *See, e.g., United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37, 41 (1st Cir. 2011) (applying the Contract Clause to Puerto Rico). With rare exception, only Congress has the power to impair contractual obligations in bankruptcy. *See Pinkus*, 278 U.S. at 263-64; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 207 (1819) ("[A] state has authority to pass a bankrupt law, *provided such law does not impair the obligation of contracts*, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law.") (emphasis added)). The Recovery Act—which permits Puerto Rico to restructure privately held debts including

those from outside its jurisdiction—cannot be reconciled with decisions such as *Pinkus* and *Sturges*. *See also U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 27-28 (1977) (noting the Court had upheld a State's "alteration of a municipal bond contract" only once in the previous century and, even then, in unique circumstances).

And, unlike Puerto Rico's Tenth Amendment claim, the Contract Clause argument is presented in this case. Comm. Pet. App. 20a (avoiding Respondents' Contract Clause claim by affirming the district court's preemption holding). Adopting Petitioners' reading would require a remand to the lower courts to decide the Contract Clause question. If anything, then, the avoidance canon counsels in favor of adopting Respondents' construction of Section 903(1)—not Puerto Rico's.

II. State Laws Like The Recovery Act Jeopardize Bankruptcy Uniformity And Would Disrupt The National Economy.

The decision to vest Congress with the authority to create a national bankruptcy system was not a matter of political philosophy; it was rooted in practical experience. James Madison and Alexander Hamilton were in accord: uniformity was essential to a functioning economy. "The power of establishing uniform laws of bankruptcy," Madison explained, "is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, at 221 (George W. Carey & James McClellan eds., 2001). Hamilton concurred that national uniformity was key, and

that "if each State had power to prescribe a distinct rule, there could be no uniform rule." The Federalist No. 32, at 155 (George W. Carey & James McClellan eds., 2001).

There was broad agreement, given the experience under the Articles of Confederation, that States could not be left to their own devices when it came to a matter so vital to the marketplace. As Justice Story explained, the Bankruptcy Clause thus reflects

> the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states. It is obvious that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests and pursuits. Under such circumstances no uniformity of system or operations can be expected.

2 Joseph Story, Commentaries on the Constitution of the United States § 1102 (2d ed. 1851).

It is no overstatement, then, to describe Congress's power to ensure bankruptcy uniformity as a cornerstone of interstate trade. It is a "grant of power to safeguard the nation's interest in establishing and maintaining a single market for the extension of credit without interference from parochial or otherwise obstreperous action on the part of the states." Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 41 (1983). That is, the Bankruptcy

Clause is supposed to supplant just this type of parochial local legislation.

The notion that the Recovery Act "fills a gap left by federal bankruptcy law" is untenable. Comm. Br. 11. Puerto Rico has created a bankruptcy system strictly for the benefit of its public utilities at the direct expense of out-of-state creditors like Respondents. Recovery Act, Stmt. Of Motives, § A; Comm. Pet. App. 139a-140a (explaining that the Recovery Act was intended to ameliorate the fiscal situations of distressed Puerto Rican public corporations). Further, it grants these favored municipalities far greater rights vis-à-vis their creditors than the Bankruptcy Code ever would. It "permits a binding modification, including debt reduction, to a class of debt instruments with the assent of creditors holding just over one-third of the affected debt. There is no analogous 'consensual' procedure under federal law." Comm. Pet. App. 18a (internal citations omitted). Also, "unlike in the federal Code, the Recovery Act does not provide a 'safe harbor' for derivative contracts." *Id.* (citations omitted). There are other important differences too, but the fundamental point is this: the Recovery Act does not confront a problem left *unaddressed* by federal law; it is a transparent attempt to prescribe a different answer than federal law provides in order to protect a narrow set of financially distressed local interests from their creditors.

The Recovery Act thus embodies the two evils that led the Framers to endow Congress with the authority to shape a national bankruptcy system. First, it closely resembles the notorious private bills that were all too common under the Articles of Confederation. "A law can

hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." *Ry. Labor*, 455 U.S. at 471. The Recovery Act may apply to more than one favored debtor—but not by much. *See* Comm. Pet. App. 17a (explaining that the Recovery Act was enacted to protect specific public utilities from their creditors).

Second, the Recovery Act departs from Congress's goal of bankruptcy uniformity. There can be no dispute that whatever rule applies to Puerto Rico must also apply to the District of Columbia. BlueMountain Br. 1-2, 9; Franklin Br. 2, 12. At the very least, then, these two territories would be able to install municipal bankruptcy systems despite the fact that the Bankruptcy Code was enacted to ensure uniformity across the entire United States. 11 U.S.C. § 101(55) ("The term 'United States', when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.").

This disruption, however, cannot even be limited to Puerto Rico and the District of Columbia. Again, *any* State can achieve the same authority Puerto Rico claimed for itself by denying to its municipalities authority to seek Chapter 9 protection. *See supra* 12-14. If the Recovery Act is upheld, States would have every reason to follow suit. Having felt the sting of Puerto Rico's protectionism, they may respond in kind. Indeed, "diversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring states."

2 Story, *supra*, at § 1102. The concern that the States may engage in a race to the bottom "is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state." *Id.*

If Puerto Rico may protect its municipalities from out-of-state creditors, including those from California, California may protect its municipalities from out-of-state creditors, including those from New York, and New York may protect its municipalities from out-of-state creditors, including those from Illinois, and on it will go. As Justice Story understood:

> There will always be found in every state a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to enlarge the boundaries, so as to give distant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.

Id.

Although this brand of local favoritism might be in each State's short-term financial interest, it would lead to a downward spiral of retaliation causing damage to the national economy. The availability of credit is the lifeblood of a capitalistic economy. "Acting as the nervous system of the economy, credit permits the pooling of capital assets from diverse sources and their rapid deployment

in response to supply and demand signals, eliminating geographical barriers to investment." Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 Ohio St. L.J. 291, 294-95 (1994); *see* Edward Everett, *Accumulation, Property, Capital, and Credit*, 1 Hunt's Merchants' Mag. 21, 27 (1839) ("Credit has built cities, cleared wilderness, and bound the remotest parts of the continent together with chains of iron and gold."). There can be no capital investment without a stable credit market.

The bond market has been an especially important resource for municipalities and other instruments of local government looking to fund infrastructure projects. "The municipal bond market has been a key, low-cost source of infrastructure financing in the United States since the mid-1800s .... Municipal bonds are used to finance a broad spectrum of public infrastructure, such as roads, bridges, airports, utility systems, schools, hospitals, courthouses, jails, administrative offices, and other public facilities." National Association of Bond Lawyers, *Tax Exempt Bonds: Their Importance to the National Economy and to State and Local Governments*, White Paper 4 (Sept. 2012). For this reason, the Recovery Act, which will deter investment in municipal infrastructure, is counterproductive to Puerto Rico's long-term interests.

Importantly, the bond market's durability is vital to the broader economy's health. This is a massive capital market. From 1991 to 2007, a period for which there is complete data, about three-quarters of the $1.7 *trillion* of "tax-exempt debt issued to finance new infrastructure projects ... were used for capital spending on infrastructure by states and localities." *Id.* "Businesses," in turn, "depend on

airports, highways, and electric, water and sewer utilities and upon quality education systems to provide an educated workforce. A lack of investment in infrastructure will hurt long-term economic growth and, in the short term, result in loss of construction-related jobs." *Id.* at 5. "To the extent that the cost of borrowing to state and local government increases, unless substantial amounts of other federal funds, including grants, are made available to compensate them for the higher costs of taxable debt, state and local governments will be discouraged from such infrastructure investments." *Id.* "Creating a disincentive for banks to hold these bonds," Senator Schumer of New York has explained, "could slow or even stop major infrastructure projects in their tracks." Jesse Hamilton & Cheyenne Hopkins, *Regulator Fight Over Munis Threatens New School for Your Kid*, Bloomberg Business (Mar. 18, 2015).

Although many factors bear on the investment decisions of individuals and firms with excess capital, their ability to enforce repayment terms is chief among them. A uniform bankruptcy system is critical to being able to ensure predictability:

> The primary function of the bankruptcy system is to continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness generally to pay his debts. Especially from creditors' perspectives, it is important to have rules that determine rights generally in the debtor's wealth, wherever situated, and thus guide conduct in the open credit economy, as well as collective processes which effect such rules and permit creditors to realize on their claims.

Communication From the Executive Director, Comm'n on the Bankruptcy Laws of the United States Transmitting a Report of the Comm'n on the Bankruptcy Laws of the United States, July 1973, H.R. Doc. No. 137, Part I, at 71 93d Cong., 1st Sess. (1973).

"For creditors," then, nationwide bankruptcy law—including stable rules about which entities can authorize municipalities to participate in the federal regime—"provides a predictable and orderly system for liquidation or reorganization of the debtor with repayment through equitable distribution." *In re Westmoreland Coal Co.*, 213 B.R. 1, 6 (Bankr. D. Colo. 1997). In fact, "[u]nder a stable system of debt relief ... it is often possible to calculate the risk of nonperformance occasioned by bankruptcy and fairly allocate it among contracting ventures." Sauer, *supra*, at 301. In other words, "bankruptcy becomes a mechanism of risk sharing, rather than risk shifting, when systematically administered." *Id.*

The patchwork rule that Petitioners advocate would deprive creditors, as to municipalities, of the stability and predictability needed for this capital market to function properly. It would be difficult, if not impossible, to rationalize investment in municipal bonds *ex ante* if the States are free to impair creditors' contractual rights on terms of their own choosing via an alternative *ex post* bankruptcy system like the Recovery Act. For low-cost capital to remain broadly available, investors must have the certainty that municipalities will be permitted to reorganize their debt on the terms set forth in Chapter 9 or not at all.

That result can be assured only by affirming the First Circuit's sound conclusion that Chapter 9 of the Bankruptcy Code remains the uniform mechanism for restructuring municipal debt. Petitioners' indefensible interpretation of Section 903(1) will allow each State in the Union to circumvent Chapter 9 by enabling municipalities to file for bankruptcy under a patchwork of parochial laws. What type of alternative bankruptcy system each State adopts and how that system will treat creditors is anyone's guess. But what is certain is that the non-uniform regimes that will replace the national bankruptcy system the Framers created and Congress implemented through the Bankruptcy Code will cause lasting damage to the economy.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

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